

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 3 1996

In the Matter of)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

DOCKET FILE COPY ORIGINAL

(Access to Rights of Way)

REPLY COMMENTS

of the

RURAL TELEPHONE COALITION

The Rural Telephone Coalition ("RTC") files these Reply Comments in response to the right of way issues portion of the *Notice of Proposed Rulemaking* released in this docket on April 19, 1996 ("NPRM").

The Rural Telephone Coalition is comprised of the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA"), and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO").

DISCUSSION

In earlier comments the RTC explained that Section 251(b)(4) of the Telecommunications Act of 1996 ("1996 Act")¹ primarily provides for private negotiation of carrier arrangements for access to poles, ducts, conduits and right-of-way and state regulation in the absence of private agreements. The 1996 Act leaves room for Commission regulation only with respect to pole

¹ Pub. L. No. 104-104

Rural Telephone Coalition, June 3, 1996

No. of Copies rec'd
List ABCDE

09/12

attachment charges. Many parties agree with this interpretation of Sections 251 and 224 and urge the Commission not to issue detailed rules that are not necessary in light of the statutory scheme or that would be premature and too regulatory even if the Commission had the authority to act.² The California Public Utility Commission recommends that the Commission refrain from developing regulations on access to rights-of-way and other utility facilities listed in Section 251(b)(4) at this time. It believes the six month time frame is insufficient to analyze the issues raised by Sections 251(b), 224(f) and 244(h).³ California is one of the states currently examining rights-of-way issues. GTE Service Corporation ("GTE") also states that specific regulations beyond the rate regulations required to be promulgated under Section 224(e) will only result in countless and counterproductive disputes.⁴ Consistent with the RTC's position, it believes that Section 251(b)(4) is self effectuating and needs no regulations for implementation.

BellSouth Corporation ("BellSouth") suggests that further regulations are not needed in view of the fact that Section 224 already contains a long-standing complaint procedure for Commission resolution of pole attachment disputes.⁵ The electric utilities are also concerned that hard and fast rules are inappropriate at this stage and suggest that the Commission, in the absence of state regulation, decide access disputes on a case by case basis through the complaint process.⁶

² USTA, *e.g.*, at 9.

³ CPU May 20, 1996 Comments at 7 (hereafter all references to the comments of other parties are to the May 20, 1996 filings in this docket)

⁴ GTE at 21-23.

⁵ BellSouth Comments at 13 referring to the complaint procedures in 47 C.F.R. § 1.1401 *et seq.*

⁶ *See, e.g.*, Delmarva Power & Light Company at 4-7; Dequesne Light Company at 3-4.

The RTC agrees that the Commission has adequate enforcement procedures available and need not proceed with more detailed regulations in light of its limited role under Section 251(b)(4).

Other parties also agree that access to rights-of-way and facilities on or over them involve unique issues and settled precepts of local property and contract law.⁷ Like the RTC, others are concerned that the Commission may overstep the bounds of what is permitted under the Fifth Amendment.⁸

US West, INC. identifies a major caveat, "The controlling LEC cannot grant what it does not have." It reiterates the RTC concern that some right of way agreements and private easements are restricted to a given carrier and specific uses and states that virtually all public easements are restricted to a given carrier. If the Commission enacts rules, it should specify that competing carriers must on their own obtain access, licenses or easements from grantors and licensors that have given the LECs limited use.⁹ The Act does not contemplate that the LEC is to act as agent for the competing carrier in obtaining the necessary permission from the third party owners or licensors.

The RTC agrees with BellSouth's recommendation that the Commission should clarify that the term "right of way" means only the public rights of way historically granted by franchising authorities and not private easements.¹⁰ The RTC agrees with this suggestion provided the

⁷ BellSouth at 17; GVNW Inc. Management at 9.

⁸ See, e.g., America Electric Power Service Corporation and sixteen other utilities at 7-10.

⁹ US West at 17.

¹⁰ BellSouth at 17

Commission also makes clear that even in instances where public rights of way are involved, LECs have no obligation to give access if their rights in public property are restricted by state law, local ordinance or easement contracts with franchising authorities or other public owners. In earlier comments the RTC made the point that LECs in rural areas need flexibility in deciding how much capacity they can allocate for use by others. Other commenting parties make the point that nondiscriminatory access should not be interpreted to deprive companies of the ability to reserve capacity for their present and anticipated needs based on 5 year forecast and the space needs related to maintenance and municipal requirements.¹¹ The RTC agrees that “non discriminatory” access should not be interpreted so as to jeopardize the LEC’s ability to meet “provider of last resort” obligations. Commission regulations must take account of the statutory framework that will require eligible telecommunications carriers to deliver universal service in service areas established by State commissions. Provider of last resort obligations require prudent planning and the exercise of business judgment about needed capacity. The RTC opposes AT&T’s recommendation that the Commission should issue a rule requiring that spare capacity be made available upon request and defining “spare capacity” as “any capacity in excess of what is currently needed by the utility efficiently to serve existing customers and what the utility has set aside for immediately foreseeable future use--for example, within one year or less.” AT&T also urges the Commission to clarify that incumbent LEC “reserve capacity” is “spare capacity.”¹² AT&T’s suggestion is irresponsible, especially as it relates to small rural LECs that operate in high cost areas. These LECs must have the flexibility to plan and provide over the long term and

¹¹ SBC Communications Inc. (“SBC”) at 18

¹² AT&T at 16.

the assurance that they will not be penalized for planning wisely. The RTC urges the Commission to reject AT&T's suggestion. The company would obviously not be recommending a one year planning cycle if, as it carefully points out, Section 224(f) did not provide "an asymmetrical set of duties" that do not require new local exchange carriers like itself to provide "nondiscriminatory access" to competing providers.¹³

Commission regulations should not dictate business judgment decisions related to planning, safety or reliability or interfere with the LEC's ability to fulfill statutory duties. Nor should the Commission ignore concerns related to safety and reliability in examining whether there are conditions or circumstances that justify LECs' denial of access. The RTC agrees with Bell Atlantic's recommendation that all utility companies should have the same right as electric companies have under Section 224(f)(2) to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."¹⁴ LECs, like electric companies, observe the National Electric Safety Code clearance requirements, other industry engineering and safety standards, national, state and local safety or building codes. They, like the electric utilities, must have the ability to exclude entities that jeopardize the safety and reliability of the network by violating standards or by introducing impediments to the LEC's ability to comply with appropriate standards or codes.¹⁵

¹³ *Id.* At 12, Cincinnati Bell Telephone at 7

¹⁴ Bell Atlantic At 14.

¹⁵ *Id.*

CONCLUSION

For the above stated reasons, the RTC recommends that the Commission refrain from promulgating specific right-of-way rules at this time

Respectfully submitted,

THE RURAL TELEPHONE COALITION

NRTA

NTCA

OPASTCO

By: Margot S. Humphrey
Margot Smiley Humphrey
(By MSH)

By: David Cosson (By MSH)
David Cosson
L. Marie Guillory
Steven E. Watkins

By: Lisa M. Zaina (By MSH)
Lisa M. Zaina
Ken Johnson
Stuart Polikoff

Koteen & Naftalin, LLP
1150 Connecticut Ave., NW
Suite 1000
Washington, D.C. 20036
(202) 467-5700

2626 Pennsylvania Ave., NW
Washington, D.C. 20037

(202) 298-2300


21 Dupont Circle, NW
Suite 700
Washington, D.C. 20036

(202) 659-5990

June 3, 1996

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Reply Comments of the National Telephone Cooperative Association in CC Docket No 96-98 re Access to Rights of Way was served on this 3rd day of June 1996, by first-class, U.S. Mail, postage prepaid, to those who are required to be served under the NPRM and to the the following persons on the attached list.


Rita H. Bolden

DOCKET 96-98

IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996 **SEPARATE FILING ON RIGHTS-OF-WAY, DIALING PARITY AND NUMBER ADMINISTRATION** **FILING DATE: MAY 20, 1996**

# AS FILED	NAME OF FILING ENTITY	PAGE COUNT
1.	AMERICAN COMMUNICATIONS SERVICES, INC.	
2.	AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL	
3.	AMERITECH	
4.	ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES (ALTS)	
5.	AT&T	
6.	BEEHIVE TELEPHONE COMPANY, INC.	
7.	BELL ATLANTIC	
8.	BELLSOUTH	
9.	CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION (CTIA)	
10.	CELPAGE, INC.	
11.	CINCINNATI BELL TELEPHONE	
12.	CITIZENS UTILITIES COMPANY	
13.	CONNECTICUT LIGHT AND POWER COMPANY, ET AL	
14.	CONTENTAL CABLEVISION, INC. ET AL	
15.	COSOLIDATED EDISON COMPANY OF NEW YORK, INC	
16.	COX COMMUNICATIONS, INC.	
17.	DELMARVA POWER & LIGHT COMPANY	
18.	DISTRICT OF COLUMBIA PUBLIC SERVICE COMMISSION	
19.	DUQUESNE LIGHT COMPANY	
20.	FLORIDA POWER CORPORATION	
21.	FRONTIER CORPORATION	
22.	GENERAL COMMUNICATION, INC. (GCI)	
23.	GENERAL SERVICES ADMINISTRATION AND DEPARTMENT OF DEFENSE (GSADOD)	
24.	GENERAL COMMUNICATION, INC.	
25.	GST TELECOM, INC. (GST)	
26.	GTE SERVICE CORPORATION	
27.	GVNW INC./MANAGEMENT	
28.	KANSAS CORPORATION COMMISSION	
29.	KANSAS CITY POWER & LIGHT COMPANY	
30.	LINCOLN TELEPHONE AND TELEGRAPH COMPANY	
31.	LOUISIANA PUBLIC SERVICE COMMISSION	
32.	MASSACHUSETTS ELECTRIC COMPANY, ET AL	
33.	MCI	

34. MFS COMMUNICATIONS COMPANY, INC
35. MICHIGAN PUBLIC SERVICE COMMISSION STAFF (BAD ORIGINAL COPY)
36. NATIONAL CABLE TELEVISION ASSOCIATION, INC.
37. NEBRASKA RURAL DEVELOPMENT COMMISSION
38. NEW JERSEY BOARD OF PUBLIC UTILITIES
39. NEXTLINK
40. NORTHERN TELECOM INC. (NORTEL)
41. NYNEX
42. OHIO EDISON COMPANY
43. OMNIPOINT COMMUNICATIONS INC.
44. PACIFIC TELESIS GROUP
45. PAGING NETWORK, INC.
46. PENNSYLVANIA PUBLIC UTILITY COMMISSION
47. PEOPLE OF THE STATE OF CALIFORNIA AND PUC OF STATE OF CALIFORNIA
48. PUBLIC SERVICE COMPANY OF NEW MEXICO
49. PUBLIC UTILITIES COMMISSION OF OHIO
50. PUBLIC SERVICE COMPANY OF NEW MEXICO
51. PUGET SOUND POWER & LIGHT COMPANY
52. RURAL TELEPHONE COALITION
53. SBC COMMUNICATIONS INC.
54. SPRINT
55. SUMMIT COMMUNICATIONS, INC.
56. TELECOMMUNICATIONS RESELLERS ASSOCIATION
57. TELEPORT COMMUNICATIONS GROUP INC.
58. TIME WARNER COMMUNICATIONS HOLDINGS, INC.
59. UNITED STATES TELEPHONE ASSOCIATION
60. US WEST, INC.
61. UTC AND THE EDISON ELECTRIC INSTITUTE
62. VANGUARD CELLULAR SYSTEMS, INC.
63. VIRGINIA ELECTRIC AND POWER COMPANY
64. VIRGINIA POWER
65. WESTERN ALLIANCE
66. WINSTAR COMMUNICATIONS, INC.